Office Supreme Court, U.S.
FILED
APR 8 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

..... Term A. D. 1964.

No. 981

FRANK E. MEEKS,

Petitioner,

versus

GEORGIA SOUTHERN & FLORIDA RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA.

THOMAS J. LEWIS,
THOMAS J. LEWIS, JR.,
905-09 Healey Building,
Atlanta, Georgia 30303,
Counsel for Petitioner.

SUBJECT INDEX.

	Page
OPINION OF THE COURT BELOW	1
STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED	2
THE QUESTIONS PRESENTED FOR REVIEW	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE:	
(a) The Material Facts	8
ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT	16
POINT I—THE COURT OF APPEALS OF GEORGIA IMPROPERLY INVADED THE PROVINCE OF THE JURY	16
POINT II—THE COURT OF APPEALS OF GEORGIA IMPROPERLY HELD THAT PETITIONER FAILED TO CARRY THE BURDEN OF PROOF THAT HIS INJURIES WERE PROXIMATELY CAUSED, IN WHOLE OR IN PART, BY ANY NEGLIGENCE ON THE PART OF THE RESPONDENT	19
Factual Basis for Jury Finding of Negligence	19
CONCLUSION	30

INDEX TO APPENDICES.

	Page
Appendix A—Judgment to be Reviewed, dated December 3, 1963	33
Appendix B—Order Denying Motion for Rehearing, Dated December 20, 1963	48
Appendix C—Order of the Supreme Court of Georgia Denying Petition for Writ of Certiorari, Dated February 10, 1964	49
Appendix D—Order Withholding Transmission of the Remittitur from the Court of Appeals of Georgia To the Superior Court of Tift County, Georgia, Dated February 14, 1964	49
Appendix E—Statutory Provisions Believed to Confer on this Court Jurisdiction to Review the Judgment in Question	50
Appendices F, G & H—Pertinent Parts of Federal Employers' Liability Act	50, 51, 52

TABLE OF AUTHORITIES CITED.

Cases.

Affolder v. N. Y. C. & St. L. R. Co., 339 U.S. 96, 70 S. Ct. 509, 94 L. Ed. 683	17
Anderson v. Atchison, T. & S. F. R. Co., 333 U. S. 821, 68 S. Ct. 854, 92 L. Ed. 1108 (1948)	5, 8
Anthony v. L. & N. R. Co., 316 F. (2d) 858	26
A. C. L. R. Co. v. Gunter, 229 Fed. (2d) 842	27
A. C. L. R. Co. v. Singletary, 80 Ga. App. 297	26
Bailey v. Central Vermont R. Co., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444 (1943)	5, 7, 16, 20, 30
Blair v. Baltimore & O. R. Co., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490 (1945)	5

TABLE OF AUTHORITIES CITED—(Continued)

Page

Cases—(Continued)

Boston & Maine Railroad v. Meech, 156 F. 2d 109 (1st Cir. 1946) (Cert. Den. Oct. 28, 1946), 329 U. S. 763, 67 S. Ct. 124, 91 L. Ed. 658 5

Brown v. Western Ry. of Alabama, 70 S. Ct. 105 .. 27

Carter v. St. Andrews Bay R. Co., 338 U. S. 430, 70 S. Ct. 226, 94 L. Ed. 236 17

Coray v. Southern Pacific Co., 112 Utah 166, 185 P. 2d 963, 335 U. S. 520, 69 S. Ct. 275, 93 L. Ed. 208 (1949) 5, 17

Davis v. Virginian R. Co., 361 U. S. 354, 80 S. Ct. 387, 4 L. Ed. 2d 366 (1960) 5

Dennis v. Denver & R. G. W. R. Co., 84 S. Ct. 291..17, 23

Ellis v. Union Pacific R. Co., 146 Neb. 397, 19 N. W. 2d 641, 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572, (1947) 5, 19

Ferguson v. Moore-McCormack Lines, Inc., 352 U. S. 521, 77 S. Ct. 457, 1 L. Ed. 2d 511 (1957) 5

Gallick v. Baltimore & O. R. Co., 272 U. S. 108-22, 86 S. Ct. 659 ..... 17, 22, 24

Gans v. B. & O. R. Co., 319 Fed. (2d) 802 22

Gibson v. Elgin, J. & E. R. Co., 246 F. 2d 834 (7th Cir., 1957) 29

Harris v. Pennsylvania R. Co., 361 U. S. 15, 80 S. Ct. 22, 4 L. Ed. 2d 1 (1959) 5

Jamison v. Encarnacion, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082 (1930) 7

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946) 5, 17, 25, 28, 29

Lillie v. Thompson, 332 U. S. 459, 68 S. Ct. 140, 92 L. Ed. 73 (1947) 5, 7

Louisville & Nashville Co. v. Botts, 173 F. (2d) 164 167, (CCA 8, 1949) 16

TABLE OF AUTHORITIES CITED—(Continued)

Page

Cases—(Continued)

Marsh v. Illinois Cent. R. Co., 175 F. 2d 498, 499 (5 CCA) 18
O'Day v. Chicago R. & I. R. Co., 216 F. 2d 79 18
Pauly v. McCarthy, 109 Utah 398, 166 P. 2d 501, 330 U. S. 802, 67 S. Ct. 962, 91 L. Ed. 1261 (1946) 5
Rogers v. Missouri Pac. R. Co., 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 .....5, 7, 28, 29
Schenker v. B. & O. R. Co., 83 S. Ct. 1667 28
Schultz v. Penn. R. Co., 76 S. Ct. 608 .....17, 25
Sivert v. Penn. R. Co., (7 CCA) 197 F. 2d 371 18
Stone v. N. Y. C. & St. L. R. Co., 344 U. S. 407, 73 S. Ct. 358, 97 L. Ed. 441 17
Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520 (1944) 5, 6, 17
Texas & Pacific R. Co. v. Behymer, 189 U. S. 468, 23 S. Ct. 622, 47 L. Ed. 905 (1903) 19
Tiller v. Atlantic Coast Line R. Co., 128 F. 2d 420, (4th Cir. 1942) 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610 (1943) 5, 16
Urie v. Thompson, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949) 6, 7
Webb v. I. C. R. Co., 352 U. S. 512, 77 S. Ct. 451, 1 L. Ed. 2d 503 (1957) 6, 27
Wilkerson v. McCarthy, 112 Utah 300, 187 P. 2d 188, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (1947) 6, 18

Statutes.

United States Code Annotated, Secs. 51 to 60, Title 45 Sec. 1257 (3) Title 28 .....2, 8, 27

IN THE
SUPREME COURT OF THE UNITED STATES

..... **Term A. D. 1964.**

No.

FRANK E. MEEKS,

Petitioner,

versus

GEORGIA SOUTHERN & FLORIDA RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA.

To The Honorable The Supreme Court of the United States of America:

Frank E. Meeks respectfully petitions this Honorable Court to grant the Writ of Certiorari to the Court of Appeals of Georgia in the above cause.

In this behalf, Petitioner shows unto the Court:

I.

OPINION OF THE COURT BELOW.

Georgia, Southern & Florida Railway Company, Appellant v. Frank E. Meeks, Appellee, 108 Ga. App. 808 (R. 187 and see Appendix to this Petition).

II.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

Judgment to be Reviewed, dated December 3, 1963, (R. *205*), (Appendix A), Order Denying Motion for Rehearing dated December 20, 1963, (R. *206*), (Appendix B). Order of the Supreme Court of Georgia Denying Petition for Certiorari to that Court, dated February 10, 1964, (R. *207*), (Appendix C), and Order Withholding Transmission of the Remittitur from the Court of Appeals of Georgia to the Superior Court of Tift County, Georgia, dated February 14, 1964, (Appendix D).

Statutory Provisions Believed to Confer on this Court Jurisdiction to Review the Judgment in Question 28 U. S. Code, Sec. 1257 (3), (Appendix E).

The rights, privileges and immunities here claimed arise under the Federal Employers' Liability Act, 35 Stat. 65, 36 Stat. 291, 53 Stat. 1404, 45 U. S. Code, Sec. 51-60. (Appendices F, G, & H.)

III.

THE QUESTIONS PRESENTED FOR REVIEW.

(a) Whether there are probative facts in the record to support the findings of the jury that there was negligence on the part of the defendant or probative facts in the record from which the jury could have

inferred negligence on the part of the defendant which contributed, in whole or in part, to the injury sustained by petitioner;

(b) Whether the trial court erred in denying the defendant's motion for judgment notwithstanding the verdict;

(c) Whether the Court of Appeals' decision is in conflict with the controlling decisions of the United States Supreme Court.

The trial court held (R. 29) that there *was* evidence of negligence sufficient to support the findings of the jury in favor of the petitioner and overruled defendant railroad's motion for judgment notwithstanding the verdict.

The Court of Appeals of Georgia reversed (R. 204) holding that no act of negligence on defendant's part contributed, in whole or in part, to petitioner's injuries and that the trial court erred in denying defendant's motion for judgment notwithstanding the verdict.

(1) If petitioner, in the performance of his duties, was required to dismount from the engine of a freight train moving from 10 to 15 miles per hour onto sloping, rocky and unlevel ground where his footing was insecure, could the jury have found or inferred that such conditions amounted to negligence on the part of defendant railroad which contributed, in whole or in part, to petitioner's injuries? The Court of Appeals of Georgia erroneously held that it could not.

(2) Could the jury have found that the defendant railroad was negligent and that such negligence contributed, in whole or in part, to petitioner's injuries if, in the performance of his duties, he had to get into a stooped over, straining, awkward position on uneven, unlevel ground which was grown up with weeds in order to turn or throw a derailer which had not been greased, oiled or maintained for a least six months previously and which was stiff, tight, defective and hard to throw? The Court of Appeals of Georgia erroneously held that it could not.

(3) Could the jury have found that the presence of a buildup of approximately two feet of cement on the ground, causing the same to be unlevel and uneven in the area where petitioner had to "chock" a box car placed at said location, was negligence which caused, in whole or in part, petitioner's injuries when he had to get into a stooped over, straining, awkward position because of said conditions in order to perform his duties? The Court of Appeals of Georgia erroneously held that it could not.

The jury *was* authorized by the controlling authorities to find (and by its verdict for petitioner did so find) that one or more or all of the above-described (1, 2, or 3) events caused or contributed to cause petitioner's injuries.

By holding that petitioner failed to carry the burden of proof that his injuries were caused by an act of negligence on defendant's part, the Court of Appeals

of Georgia erroneously substituted its conclusions for those of the jury. Said decision is contrary to and conflicts with the controlling decisions of the United States Supreme Court.

The decision of the Court of Appeals of Georgia is in conflict with *Anderson v. Atchison, T. & S. F. R. Co.*, 333 U. S. 821, 68 S. Ct. 854, 92 L. Ed. 1108 (1948); *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444 (1943); *Blair v. Baltimore & O. R. Co.*, 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490 (1945); *Boston & Maine Railroad v. Meech*, 156 F. 2d 109 (1st Cir. 1946) (Cert. Den. Oct. 28, 1946), 329 U. S. 763, 67 S. Ct. 124, 91 L. Ed. 658; *Coray v. Southern Pacific Co.*, 112 Utah 166, 185 P. 2d 963, 335 U. S. 520, 69 S. Ct. 275, 93 L. Ed. 208 (1949); *Davis v. Virginian R. Co.*, 361 U. S. 354, 80 S. Ct. 387, 4 L. Ed. 2d 366 (1960); *Ellis v. Union Pacific R. Co.*, 146 Neb. 397, 19 N. W. 2d 641, 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572 (1947); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U. S. 521, 77 S. Ct. 457, 1 L. Ed. 2d 511 (1957); *Harris v. Pennsylvania R. Co.*, 361 U. S. 15, 80 S. Ct. 22, 4 L. Ed. 2d 1 (1959); *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946); *Lillie v. Thompson*, 332 U. S. 459, 68 S. Ct. 140, 92 L. Ed. 73 (1947); *Pauly v. McCarthy*, 109 Utah 398, 166 P. 2d 501, 330 U. S. 802, 67 S. Ct. 962, 91 L. Ed. 1261 (1946); *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493; *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520 (1944); *Tiller v. Atlantic Coast Line R. Co.*, 128 F. 2d 420 (4th Cir. 1942), 318 U. S. 54, 63 S. Ct. 444, 87 L.

Ed. 610 (1943); *Urie v. Thompson,* 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949); *Webb v. Illinois Central R. Co.,* 352 U. S. 512, 77 S. Ct. 451, 1 L. Ed. 2d 503 (1957); *Wilkerson v. McCarthy,* 112 Utah 300, 187 P. 2d 188, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (1947), and many other cases set forth in this petition.

Some of the language from the above cases is particularly applicable here. In *Lavender v. Kurn, supra,* this court stated:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.
>
> "But where, as here, there is an evidentiary basis for the jury's verdict, . . . the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

In *Tennant v. Peoria & P. U. R. Co., supra,* this court stated:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury . . . It is the jury, not the court, which is the fact-finding body . . . the very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable."

In *Bailey v. Central Vermont R. Co., supra,* this court stated:

> "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

In *Jamison v. Encarnacion,* 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082 (1930), this court stated:

> "The act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning."

And in *Rogers v. Missouri Pacific R. Co., supra,* this court stated:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death."

This Court has recognized that a railroad's duty to exercise reasonable care extends to protection of its employees from any and all sorts of harm. See *Lillie*

v. Thompson, supra. (Unprotected telegraph operator criminally assa lted); *Urie v. Thompson, supra,* (exposure to silica dust); *Anderson v. Atchison, T. & S. F. R. Co., supra,* (exposure to weather).

IV.

STATUTES INVOLVED.

The statutes involved are:

28 U. S. Code, § 1257 (3)	(Appendix E), Page 50
45 U. S. Code, § 51	(Appendix F), Page 50
45 U. S. Code, § 53	(Appendix G), Page 51
45 U. S. Code. § 54	(Appendix H), Page 52

V.

STATEMENT OF THE CASE.

(a)

The Material Facts.

This action was brought in the Superior Court of Tift County, Georgia, by petitioner, Frank E. Meeks, under the Federal Employers' Liability Act, 45 U. S. C. A., § 51-60, to recover damages for personal injuries suffered by him on March 6, 1960, as a result of the negligence of respondent. (R. 4-15.)

The action was brought in three counts, each setting out acts of negligence which were alleged to be the proximate cause or contributing causes of injuries

complained of by petitioner. It was alleged that petitioner was employed by the defendant as a switchman in the crew of a local freight train which departed Valdosta, Georgia, with Macon, Georgia, as its ultimate destination. The train was to stop at an industrial plant (the Tifton Concrete Pipe Company) just south of Tifton, Georgia, and one car of cement was to be placed on a side track serving that industry. Petitioner, in order to be in the proper position for the performance of his duties, had to dismount from the engine at a certain spot south of the switch to the siding. The area thereabout had no path upon which to walk, but was sloping away from the tracks, was rocky, unlevel and uneven; the footing there was insecure. When the engine approached the area it was traveling at a speed of approximately 10 to 15 miles per hour, which was faster than was reasonable and safe under the circumstances. Petitioner alleged in Count One that the aforesaid circumstances caused the place of work to be unsafe and said unsafe conditions and place of work was the sole proximate cause, in whole or in part, of his injuries or contributed with other negligent acts set out in the other two counts to cause his injuries.

In Count Two he alleged that after dismounting and uncoupling certain cars from the rest of the train, his next duty was to remove a derailer from the side track into which the car of cement was to be placed. The handle of the derailer was located only six to seven inches from the ground and this necessitated his getting into a stooped-over, crouched, awkward posi-

tion. He alleged that the area around the derailer was rocky, sloping and grown up with weeds; that the derailer itself was old, rusty, worn and had not been greased, oiled or properly maintained and was stiff, tight, defective and difficult to operate. That the condition of the ground, combined with the defective condition of the derailer, the position he had to get into, and the force he had to exert was the proximate cause of his injuries, or contributed with other alleged negligent acts to cause his injuries.

In Count Three petitioner alleged that the area where the car for the Tifton Concrete Pipe Company was "spotted" was not a reasonably safe place for him to perform his duties for that said area, because of the cement spillage in the past had built up to a height of approximately two feet from the ground and was uneven and unlevel and when petitioner had, as his job required, tried to place a chock under the wheel of said car to keep the same from rolling out of the track, he, of necessity, had to get into a straining, awkward and stooped-over position to lean under the car to place said chock and he alleged that said unsafe condition was the proximate cause of his injuries, or contributed with other alleged acts of negligence to cause his injuries.

In each of the three counts petitioner alleged that the conditions complained of constituted a place of work which *was not reasonably safe* due to defendant's negligence and that (in Count Two) defendant further was *negligent in furnishing an appliance (derailer) which was defective.*

After performing these various tasks, and while walking back to the engine, petitioner felt pain in his back. (R. 37.) He testified that he did not know which of the three situations resulted in his back condition, ". . . but it was one of them." (R. 155.) After getting on the engine he was in such severe pain that he could perform no more work.

In support of his complaint, petitioner testified regarding negligence alleged in Count One: (R. 31)

> ". . . . He slowed down for that stop when I told him the second time we had a car to set off at the Tifton Concrete Pipe Company . . . That track coming off down here is the industrial track at the Tifton Concrete Pipe Company. The area along there, where you have shaded it out with your finger, to here has a lot of ballast ranging from the size of a marble up to the size of my fist sloped up there. It is sloped right up to the ties. When you get in this area you find the slope built up all along the industrial track.
>
> "There is no pathway, along here, that is level and smooth." (R. 32.)
>
> "As the train moved along north on the main line track and got along where I have described I was to get off, the speed of the train was between ten and fifteen miles an hour.
>
> "The usual speed for dismounting is five to ten miles an hour." (R 32.)
>
> ". . . When I got off it was necessary for me to run to keep my balance in that rock and slag . . . ." (R. 32.)

Conductor A. E. Woodard testified: (R. *70*)

"Q. You recall this is the shoulder of a ditch that slopes from the main line east and down?

"A. There is a ditch right up to the track.

"Getting on up here a little closer to the frog—I call this the frog—along about the frog the crossties come all the way across. In a regular switching yard, a path is more or less level like the floor; but out there on that track, or any other outlying industrial track, they are not necessarily smooth." (R. *70-71.*)

"Q. In this area there is some grass in the ditch and as you get up here you have this ballast all the way across both of these tracks?" (R. *71.*)

"A. I expect it would extend across up there close to the frog.

"Q. Along in here the pathway falls off, and there is no place to drop off?

"A. Well, you have only got the roadbed. In some places it is pretty steep." (R. *71.*)

Tom Judge, Flagman, testified as follows: (R. *73*)

"There is a good deal of trash and debris around this industrial area."

As to proof of negligence alleged in Count Two, Meeks testified: (R. *53*)

"* * * This handle is approximately six inches off the ground. The handle is some six to seven inches above the track. In order to throw it, you have to get down on your knees.

"The area right around this derailer, in that general area, has ballast and weeds and things.

The ground is uneven. There are low places and high places, and there is a drainage ditch that runs back south of the main line. The footing around in this area is rough." (R. 34.)

"What I did with reference to this derailer was I unlocked it and tried to throw it off with one hand—if it works right, you can do it with one hand—and it didn't move. Then I took both hands and put on it, and it seemed to hold, and I got on top of the rail and pulled it, and it put me in an awkward position to reach that far. It was about as far apart as I indicate." (R. 34.)

"I had worked in that area before. The condition of the derailer then had been hard." (R. 34.)

"This derailer did not seem to be well conditioned, well lubricated; as far as oil, I never seen any on it. I have never seen anybody down there working on it. To my own knowledge, it had not been properly maintained and greased for six months prior to the time I was hurt." (R. 35.)

Tom Judge, Flagman, testified: (R. 73)

"I have worked in this area where Mr. Meeks got hurt. I have operated this derailer myself. At times I have found it difficult to operate.

And: (R. 74-75)

"Q. After refreshing your memory from this paper, could you give us any further information about the derailer at the Tifton Concrete Pipe Company, Mr. Judge?

"A. Sometimes you would have to take the handle and pull it down, but I don't recall ever having used the handle.

"Q. If the derailer is properly lubricated, would you have to do that?

"A. Well, no, sir. . .

"Q. If one is working properly, all you have to do is unlock it, and you have to get down on the ground pretty low, don't you?

"A. Pretty low.

"You just have to unlock it, get down and turn the pin, and it comes over."

"* * * I think I am familiar with the proper operation of derailers similar to the one located at the Tifton Concrete Pipe Company."

"Q. Would you think one was in proper operating condition that you had to work with one hand and jimmy the handle with the other in order to get it loose, or would you think one you could not just unlock, lift the lever, and operate with one hand was one that was in proper working order?

"A. Well, I would think one you had to do that with wasn't working properly."

The proof of negligence of defendant alleged in Count III is seen in Meeks' testimony: (R. 35-36)

"That area, from where they unloaded cars, there would be a spillage of cement and waste and, being there over a period of time, caused it to become hard. It would pile up to about twenty-four inches.

"With the wheels of the car on the track, the car would hang over the rail approximately thirty inches. * * * My position was a squatting position, and then I had to put the wood under that car wheel. It was an awkward position.

"Plaintiff's exhibit 1 shows the waste that has built up at the Tifton Concrete Pipe Company.

"Plaintiff's Exhibit 3 shows the clearance between the industrial track and the main line track and the wastage."

Conductor A. E. Woodard testified. (R. 71)

"Q. Down here, where the Concrete Pipe Company is, that cement has built up to a pretty good height?

"A. Well, I just don't know how high it is. There is some scattered cement there, but I just don't remember. I haven't been to the track in over a year. There is some cement there that has set up."

At the conclusion of all the evidence, defendant made a motion for a directed verdict which was denied by the Court. (The motion and ruling were not included in the Brief of Evidence prepared by defendant for use in the Court of Appeals.) Following the verdict and judgment for plaintiff (R. 25, 26), the defendant filed a motion for judgment notwithstanding the verdict (R. 27) which was denied by the Court on the 21st day of May, 1963. (R. 29.)

VI.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

POINT I.

THE COURT OF APPEALS OF GEORGIA IMPROPERLY INVADED THE PROVINCE OF THE JURY.

In recent years this Court has had occasion, in many instances, to express itself regarding the respective functions of the Court and jury, including the scope of appellate review in cases arising under the Federal Employers' Liability Act. The basic decisions are collected and set forth in *L. & N. R. Co. v. Botts*, 173 F. (2d) 164, 167, (CCA 8, 1949):

> "(2-3) The opinions of the Supreme Court have declared that it is 'the clear Congressional intent that, to the maximum extent proper, questions in actions arising under the Act should be left to the jury.' *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 58, 63 S.Ct. 444, 451, footnote 30, 87 L. Ed. 610, that such cases may not be taken from the jury merely because the question of liability is 'close or doubtful,' *Bailey v. Cent. Vt. R. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; that the jury has the right to make 'all reasonably possible inferences' from such probative facts in the evidence as it chooses to accept, and 'It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on the theory that the proof gives equal support to inconsistent and

uncertain inferences,' *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29, 32-35, 64 S. Ct. 409, 411, 412, 88 L. Ed. 520; that in any choice between possible inference 'a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference,' but 'Only when there is a complete absence of probative facts to support the conclusion reached does reversible error appear,' *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740, 744, 90 L. Ed. 916; and that the assumption that, on an issue of liability, 'juries will invariably decide . . . against railroads' is 'contrary to fact,' and courts may not act on the theory that 'juries will fall short of a fair performance of their constitutional function,' but they must assume that a jury 'finds facts only because they are proved,' *Wilkerson v. McCarthy*, 69 S. Ct. 413, 418."

To these decisions may be added the cases of:

Stone v. N. Y. C. and St. L. R. Co., 344 U. S. 407, 73 S. Ct. 358, 97 L. Ed. 441;

Carter v. St. Andrews Bay R. Co., 338 U. S. 430, 70 S. Ct. 226, 94 L. Ed. 236;

Affolder v. N. Y. C. & St. L. R. Co., 339 U. S. 96, 70 S. Ct. 509, 94 L. Ed. 683;

Coray v. Sou. Pac. R. Co., 335 U. S. 520, 69 S. Ct. 275, 93 L. Ed. 208;

Dennis v. Denver & R. G. W. R. Co., 84 S. Ct. 291;

Gallick v. Baltimore & O. R. Co., 272 U. S. 108-22, 83 S. Ct. 659;

Schultz v. Penn. R. Co., 76 S. Ct. 608;

on the question of proximate cause.

Thus it seems clear that if there are evidentiary facts which, as a matter of law, constitute negligence, the jury's verdict and the trial court's denial of Motion for Judgment Notwithstanding the Verdict should not be reversed on appeal.

In: *O'Day v. Chicago River & I. R. Co.*, 216 Fed. 2d 79, the following language appears:

> (1) "The rule is well-established that a motion for a judgment notwithstanding the verdict presents *only a question of law as to whether, when all the evidence is considered together with all reasonable inferences most favorable to plaintiff, there is a total failure or lack of evidence to prove any necessary element of plaintiff's case.*" (Emphasis added.)
>
> *Wilkerson v. McCarthy, (supra);*
> *Sivert v. Penn. R. Co., (7 CCA) 197 F. 2d 371, 375, (1) (2);*

in which latter case it was held:

> (1) "A motion for judgment notwithstanding verdict raises only the question of law of whether there is any evidence which if believed by jury, would authorize a verdict against party making the motion."
>
> (2) "On defendant's motion for judgment notwithstanding verdict, proof must be considered in the light most favorable to plaintiff."
>
> *Marsh vs. Ill. Cent. R. Co., 175 F. (2d) 498, 499 (5 CCA).*

POINT II.

THE COURT OF APPEALS OF GEORGIA IMPROPERLY HELD THAT PETITIONER FAILED TO CARRY THE BURDEN OF PROOF THAT HIS INJURIES WERE PROXIMATELY CAUSED, IN WHOLE OR IN PART, BY ANY NEGLIGENCE ON THE PART OF THE RESPONDENT.

In determining whether the evidence presented a jury question on the issue of negligence: "We must assume the most favorable statement of plaintiff's case to be true."

Texas & Pac. R. Co. v. Behymer, 189 U.S. 468, 23 S. Ct. 622, 47 L. Ed. 905, and

". . . the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury."

Ellis v. Union Pac. R. Co., [Supra].

Factual Basis for Jury Finding of Negligence.

The evidence adduced was that petitioner had, among other things, three specific duties to perform in an area about *thirty feet* in diameter (R. 37) and that the total time elapsed for the performance of the same was approximately *five minutes*. Each of the duties was accompanied by defendant negligence, (a failure to furnish a safe place to work and safe appliances with which to perform his duties), and each act of negligence was proved upon the trial of the case. There is no question about the terrain within this thirty foot area—

it was sloping, uneven, unlevel, rocky, grown up with weeds and "There is a ditch right up to the track", there was direct evidence that the derailer which petitioner had to throw had not been properly maintained and was stiff, tight and difficult to throw and, though petitioner did not know which of the three instances resulted in his injuries, he testified that it was one of the three.

The Court of Appeals of Georgia has improperly and erroneously gone outside the record and stated that petitioner's injuries *might have been the result of some other activity* in which he was engaged (R. *202*) but Meeks was the only person performing the three tasks complained of and under the conditions complained of; he was the only person who knew the degree of stress and strain required by each activity and, for that matter, by any of the other duties (not complained of) that he performed. The jury accepted Meeks' version as opposed to Respondent's version when it awarded him a verdict.

In *Bailey v. Cent. Vt. R. Co., supra*, this Court stated:

> "The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of the guard-rail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether re-

spondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions emphasize the appropriateness of leaving the question to the jury."

The Court of Appeals of Georgia erroneously held (R. *201-203*):

"Assuming for the sake of argument only, however, that a finding was authorized that the defendant railroad was negligent in at least one of the particulars charged in the petition, there is still another reason which impels the conclusion that the plaintiff failed to carry the burden of proof in this case.

". . . 'The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause, and the case must be withdrawn from its consideration, unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer." (Cases cited.)

"The plaintiff testified that he did not know which one of the three incidents set forth in his petition caused his back injury but that he knew that one of the three was responsible for the same. This conclusion, however, was unsupported by any evidence *which directly showed* that any of the three occurrences specifically caused or contributed to the injury; . . . There were no probative facts from which the jury could reasonably infer that the plaintiff's back injury resulted

> from the activity relied on in any one of the three counts of the petition as opposed to th. . . . other duties performed by the plaintiff . . .
>
> "Under these circumstances, the jury could do no more than guess or speculate as to the immediate cause of the plaintiff's injuries and such evidence is insufficient to support a verdict."

This is an erroneous legal conclusion conflicting with the United States Supreme Court's decision in the *Gallick* case (*supra*). Reading from the *Gallick* case on page 663 it will be noted that the decision of the Court of Appeals of Ohio *which was reversed by the Supreme Court of the United States* held practically the same thing:

> "'(W)e have a chain of possibilities that the negligence of the defendant might have shared in subjecting the plaintiff to damage and injury, but proof of a legal causal connection between the negligence and the damage falls short of that required for the consideration of a jury.' Ibid. Accordingly, it reversed the judgment of the Court of Common Pleas and entered final judgment for respondent."

The opinion of the Court of Appeals of Georgia is in direct conflict with *Gans v. B. & O. R. Co.*, 319 Fed. (2d) 802, wherein the United States Court of Appeals for the Third Circuit held:

> "It is apparent that, with just as much reason as finding the railroad proximately to blame under the scant known circumstances, the jury could have found, as it did, either that neither side was

> at fault or that the unfortunate happening involved was due to carelessness by Gans. In the present state of the Federal Employers' Liability Act decisional law, the district judge was duty bound to let the jury pass upon the validity of the Gans cause of action. In the state of the whole record, he was also required to submit the question of decedent's contributory negligence for jury decision." (This the trial court did in the case at bar.) (R. 173).

The opinion of the Georgia Court of Appeals is in conflict with the recent case of *Dennis v. Denver & R. G. W. R. Co.*, 84 S. Ct. 291, a case in which the plaintiff did not know when his injuries occurred.

The petitioner in this case lost several fingers as a result of frostbite and exposure from being required to work in sub-freezing weather when he had insufficient wearing apparel. His fingers became frozen sometime between 5:00 P. M. and 5:00 A. M. The United States Supreme Court in reversing the Supreme Court of Utah held:

> "In this case petitioner's evidence, *though vigorously disputed*, was sufficient to support the jury's conclusion that Respondent's negligence contributed to the injury. Hence 'the appellate court's function (was) exhausted,' Lavender v. Kurn, supra, 327 U. S. at 653, 66 S. Ct. at 744, 90 L. Ed. 916, and it could not properly substitute its judgment for that of the jury and decide as the Supreme Court of Utah did here that 'it seems quite inescapable that it was (petitioner's) own conduct . . . that resulted in this regrettable injury.'" (Emphasis added.)

The opinion of the Court of Appeals of Georgia is, in still another way, in conflict with the opinion in the case of *Gallick v. B. & O. R. Co.*, 83 S. Ct. 659. In that case, from a jury verdict for petitioner, Respondent appealed and the Court of Appeals of Ohio reversed. The Supreme Court of Ohio rendered final judgment for Respondent railroad. The United States Supreme Court reversed. Petitioner in this case was bitten by a bug or insect and developed an infection which later necessitated the amputation of both legs. To award petitioner a verdict the jury had to find that the maintenance by Respondent of a filthy pool of water near which petitioner had to work was negligence and attracted disease-carrying bugs or insects; that an insect from said pool bit petitioner; that the insect bite was something which the defendant should have foreseen and guarded against. The United States Supreme Court held:

> ". . . *court erred in demanding either direct evidence* that existence of unidentified bug which bit railroad employee had any connection with stagnant and infested pool on railroad right of way *or else more substantial circumstantial evidence than adduced* that pool created conditions and influences which helped to incubate or furnish environment for insects, or that insect, having travelled from other areas, became contaminated or infected by pool, and in reversing plaintiff's judgment under Federal Employers' Liability Act the only question was whether insect was from or had been attracted by pool. . ." and "If there is evidence *that any employer negligence caused harm*, or enough to justify jury's determination

> that *employer negligence played any role in producing harm*, it is error to refuse to accept jury's verdict against railroad 'in suit under Federal Employers' Liability Act." and "Element of reasonable foreseeability of harm in Federal Employers' Liability Act case arising out of insect bite was satisfied by jury's finding of negligence in maintaining filthy pool of water. . . ." (Emphasis added.)

The opinion of the Court of Appeals of Georgia is in conflict with the case of Schultz v. Penn. R. Co., 350 U.S. 523, 76 S.Ct. 608, 100 L. Ed. 668. There the lower court said:

> "There is some evidence of negligence and there is an accidental death. But there is not a shred of evidence connecting the two."

The United States Supreme Court in reversing held:

> ". . . We think the evidence was sufficient to require submission of the case to the jury, and that it was error not to do so."

The facts in the *Schultz* case essentially were these: A tug boat fireman was drowned in undetermined circumstances arising from his work on dark, icy and undermanned boats.

The opinion of the Court of Appeals of Georgia is in conflict with *Lavender v. Kurn*, 327 U. S. 645, 66 S Ct. 740, 90 L. Ed. 916, a Federal Employers' Liability Act case in which it was uncertain which of various alternative explanations for the cause of the injury

appeared in the record. Petitioner's and Respondent's theories both were reasonable and plausible. The jury found for petitioner, the lower court reversed for insufficient evidence, the United States Supreme Court reversed on the ground that the lower appellate court had committed "an undue invasion of the jury's historic function."

The decision of the Court of Appeals of Georgia is in direct conflict with another Court of Appeals of Georgia decision, *A. C. L. R. Co. v. Singletary*, 80 Ga. App. 297, a case brought under the Federal Employers' Liability Act, as was the case at bar, in three separate counts. On Page 306 of that decision the Court said:

> "However, if the jury decided that the death resulted in one of the three ways shown in the petition and that the negligence of the railroad was in part or in whole the proximate cause thereof, a general verdict would have been authorized without the jury's being required to find exactly which theory was correct."

The Georgia Court of Appeals' decision is in conflict with *Anthony v. L. & N. R. Co.*, 316 F. (2d) 858, in which case the plaintiff testified with reference to how his injury occurred:

> "With further reference to my accident on May 15, 1959, at Hope, Arkansas, I do not know just what hit me across the head and knocked me from the car, but it was some part of the shed or building just adjacent to the spur track. It just had to be some part of that building. . ."

As to the specific acts of negligence alleged, the Court of Appeals' holding of "no negligence" is in conflict with the following cases. As to the rough, unlevel and uneven area over which and upon which plaintiff had to perform his duties, the railroad was held negligent in *Webb v. I. C. R. Co.*, 77 S. Ct. 451 (2): "Railroad negligently causing or permitting fist-sized clinkers to be imbedded in roadbed is liable under Federal Employers' Liability Act to employee injured as a result of such hazardous condition." On Page 453 of that decision the Court said that the railroad had a duty ". . . in inspecting roadbeds for hazards to firm footing."

In *A. C. L. R. Co. v. Gunter*, 229 Fed. (2d) 842, a brakeman was allowed to recover under the Federal Employers' Liability Act for damages resulting from injuries sustained in alighting from a moving freight car and stumbling on clinkers and ballast strewn beside the track and on the crossties.

See also: *Brown v. Western Ry. of Ala.*, 70 S. Ct. 105.

Referring to Count Two, the evidence is quite clear that the derailer which petitione had to turn or throw was not properly maintained; was and had been difficult to turn or throw. By its finding that this did not constitute negligence or a "defect or insufficiency due to its negligence in its appliances," the decision of the Court of Appeals of Georgia is in conflict with the statute itself, 45 U. S. Code §51.

As to the Third Count, wherein, because of the condition of the ground, plaintiff had to get into an awkward

crouched and straining position in order to "chock" the car, the Court of Appeals of Georgia's decision that this condition did not constitute negligence or that the jury could not have inferred that it was negligence, is in direct conflict with *Schenker v. B. & O. R. Co.*, 83 S. Ct. 1667, a case in which the injured employee, because of a defect in the door of a baggage car, was allowed to recover for injury sustained when he had to get into a twisted, awkward position in order to load mail sacks.

It is a well-settled fact that juries in Federal Employers' Liability Act cases are allowed to make inferences in arriving at their verdicts if there is any evidence, even the slightest, that defendant negligence played any role in producing the harm.

> *Rogers v. Mo. Pac. R. Co., 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493.*

In *Lavender v. Kurn, supra*, the United States Supreme Court said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is

free to discard or disbelieve whatever facts are inconsistent with its conclusion."

The decision of the Court of Appeals of Georgia, in reversing the jury verdict for petitioner, is in conflict with the decisions of *Rogers v. Mo. Pac. R. Co.*, and *Lavender v. Kurn, supra*, and it is also in conflict with *Gibson v. Elgin, J. & E. R. Co.*, 246 F. 2d 834, another case in which the employee was not sure how he sustained his injury. In this case [Gibson] the testimony as to how the employee was injured is as follows:

> ". . . all I do know and do remember is that in backing out in that stooped position my one foot *must have slipped*, and catching myself I *must have straightened up*, and then I banged my head." . . . "I don't remember what it slipped on other than just grime on the floor or maybe grease."

There was a verdict for the plaintiff but the trial court granted defendant's motion for judgment notwithstanding the verdict, holding that the jury verdict could not stand because the jury, to find for plaintiff, would have to:

> ". . . infer, first, that there was such a substance at the place where the plaintiff was bending under the desk and, second, that he actually slipped because of such condition. Thus, the finding essential for the support of the verdict is based upon one inference which rests in turn upon another inference."

The United States Court of Appeals for the 7th Circuit reversed and reinstated plaintiff's verdict.

CONCLUSION.

The Court of Appeals of Georgia has denied petitioner the right of trial by jury. It says: (R. 194)

> "It is not, however, the function of the trial court in an action under the FELA to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences and courts are not free to reweigh the evidence and set aside a jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

But this is exactly what the Court of Appeals of Georgia has done and its decision should be reversed.

If the opinion of the Court of Appeals of Georgia is allowed to stand, it will serve to ". . . deprive these workers of the benefit of a jury trial in close or doubtful cases . . . (and) . . . take away a goodly portion of the relief which Congress has afforded them." *Bailey v. Cent. Vt. R. Co., supra;* if the opinion of the Court of Appeals of Georgia is allowed to stand, it will have the effect of saying the decisions in FELA cases must be uniform throughout the United States *except in Georgia.*

It is respectfully submitted that the opinion of the Georgia Court of Appeals is in conflict with many decisions of the State and Federal Courts and the FELA itself. For the reasons herein set forth, a writ of certiorari should be granted and petitioner's verdict reinstated.

Respectfully submitted,

THOMAS J. LEWIS,
THOMAS J. LEWIS, JR.,
Attorneys for Petitioner.

905-09 Healey Building,
Atlanta, Georgia 30303.

CERTIFICATE OF SERVICE.

This is to certify that I have this day served Messrs. Bloch, Hall, Groover & Hawkins, attorneys for Respondent, P. O. Box 176, Macon, Georgia, with a copy of the Petition for Writ of Certiorari and Appendices in the above stated case by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This ..... day of ....., 1964.

.....
Attorney for Petitioner.

APPENDIX A.

COURT OF APPEALS OF THE STATE OF GEORGIA

ATLANTA, December 3, 1963

The Honorable Court of Appeals met pursuant to adjournment.

The following judgment was rendered:

Georgia, Southern & Florida R. Co. v. F. E. Meeks

This case came before this court upon a writ of error from the Superior court of Tift county; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed for the reason that the trial court erred in denying the plaintiff in error's motion for judgment notwithstanding the verdict. Nichols, P. J., Frankum and Jordan, JJ., concur.

40314. GEORGIA, SOUTHERN & FLORIDA RAILWAY COMPANY v. MEEKS.

The plaintiff failed to carry his burden of proof that the injuries sustained by him were proximately caused, in whole or in part, by an act of negligence of the defendant railroad, and this being an essential requirement under the Federal Employers' Liability Act, a verdict was demanded for the defendant.

Decided December 3, 1963—

Rehearing Denied December 20, 1963.

Action under Federal Employers' Liability Act. Tift Superior Court. Before Judge Gray.

This was an action under the Federal Employers' Liability Act brought by Frank E. Meeks against the Georgia, Southern & Florida Railway Company to recover damages for personal injuries allegedly sustained by him as a result of the negligence of the defendant railroad.

The plaintiff on March 6, 1960 was performing the duties of a switchman on a local freight train that departed from Valdosta, Georgia, with Macon, Georgia, as its ultimate destination. The train was to make a stop just south of Tifton, Georgia, at an industrial plant, the Tifton Concrete Pipe Company, where the crew was to place a car of cement on the side track serving that industry. As the train approached the siding and while the engineer was still decelerating the engine, the plaintiff jumped off the engine, running about 40 feet to keep his balance; and after the train had come to a stop, he uncoupled the cars to be placed from the rest of the train. He then signaled the engineer to go ahead. Thereafter, he proceeded to a derailer located on the side track. (A derailer is a small oblong piece of metal resting on top of the rail some distance back from the switch point to prevent cars on the siding from rolling out to the main line. When a switching operation is being made on the side track, the derailer is removed from the rail by a lever device similar to that used to throw a switch. When the switching operation is completed, the derailer is replaced in position by the use

of the same lever). When the plaintiff got to the derailer, the rest of the train had proceeded north of the switch point, preparing to back the car to be placed on the siding into position. The plaintiff encountered some trouble in moving the derailer and had to exert more pressure than ordinarily required, to remove it from the rail. After removing the derailer, he walked back to spot the car which was to be placed on the side track. When the car was placed, he checked it by getting in an awkward squatting position and placing a piece of wood under a wheel of the car. He then walked back and replaced the derailer in position, crossed over to the main line and recoupled the cars and put on the air brakes and walked back to the engine. The entire operation had taken about five minutes.

As the plaintiff was walking back to the engine, he felt pains in his back which increased after he boarded the engine. The train proceeded to Tifton where the crew ate supper. Because of his back pains, the plaintiff stood up to eat. When they left Tifton, the plaintiff could perform no more work because of pain and had to lie on the floor of the engine. When he got to Macon, he was driven home by another member of the crew. He went to a doctor the next day and on the following day was hospitalized for eight days. He was treated by numerous doctors for several months, and in September, 1961, a spinal fusion operation was performed to correct his back condition.

On September 1, 1961, the plaintiff filed his petition in three counts in the Superior Court of Tift County

against the defendant railroad to recover damages for the injuries allegedly received on March 6, 1960. In count 1 of the petition the plaintiff alleged that the injuries to his back were sustained when he jumped from the moving train and it was alleged that the defendant was negligent in operating the train at the high, rapid, excessive and negligent speed of 15 to 20 miles per hour as it approached the industrial side track; and in requiring the plaintiff to dismount at an unsafe place because of the location of the tracks and the condition of the ground.

In count 2 the plaintiff alleged that the injuries were sustained as a result of the undue exertion required to move the derailer which allegedly was old, worn, rusty, and had not been greased or oiled for approximately six months prior to the occurrence and was stiff, tight, defective and difficult to throw; and it was alleged that the defendant was negligent in failing to inspect the derailer, in requiring the defendant to throw the derailer, knowing that the same was improperly maintained and difficult to turn or throw, in failing to grease or oil the derailer, and in failing to furnish the plaintiff a safe place to work.

In count 3 the plaintiff alleged that the injuries occurred when he chocked the cement car at the siding, and it was alleged that the defendant was negligent in allowing the area in which said car was spotted or placed to become uneven and unlevel from cement spillage and in requiring the plaintiff to perform his duties in such area because of the condition of the same.

The plaintiff testified on the trial of the case that his back injuries were sustained either when he jumped off the train or when he moved the derailer or when he chocked the car on the side track but that he didn't know which one of the three incidents actually caused the injuries. The plaintiff also testified that he had trouble with his back in 1954 and again in 1958 and that he had had back pains for four or five years off and on before March 6, 1960. The plaintiff's doctor testified in part as follows: "[I]t's my belief that he had what we call a degenerative disc between these two vertebrae allowing the segment to become loose. . . . A degenerative disc—a disc is a cushion between the two vertebrae, and it functions simply as a shock absorber in an automobile, and it may lose some of its water content and elasticity and thereby not give support to the spine as it should. That can result from a disease as well as traumatic, and sometimes there may be some congenital weakness in the disc. By congenital, I mean, born with a potential disc not being as good as the other. If it were congenital, over the years it could degenerate to the point where it would cause the pain and so forth I have described in this particular patient. . . . If he possessed a degenerative disc of such type and so forth to require the operation which I made on him in 1961, as to whether it would require any unusual trauma to set off the pain he was experiencing, I would say it would be quite variable; it would take some amount of stress or some abnormal moving as a rule to start it to bothering him. It could result from a mis-step on a level floor, for example.

"It could possibly result from simply bending over to pick up an article, not likely though in forward bending. It could result from less strain than would cause a strain or sprain, lumbar sprain in the average back. It could result from the exercise or tension which on a normal man would not cause a sprain or strain."

The plaintiff's doctor further testified that it would not be unusual for the condition to come about by getting off a train at 5 miles per hour, a speed said to be proper, or by operating a well oiled derailer. He said the prior condition of his back made him more susceptible to aggravation and injury and pain than a normal man, that he would have been more likely to have back trouble such as the doctor found than the average man. The other medical evidence was to the same effect, i.e., that a person with the sort of back history as plaintiff's could have had it activated as to the pain he suffered by slight physical activity or exertion.

The jury returned a verdict for the plaintiff and the defendant filed a motion for judgment notwithstanding the verdict predicated upon its previous motion for a directed verdict and in the alternative, a motion for new trial which was amended by the addition of several special grounds. These motions were denied, and the defendant excepted.

Bloch, Hall, Groover & Hawkins, Steve F. Mitchell, for plaintiff in error.

Lewis, Lewis, Whaley & Cagle, T. J. Lewis, Jr., Seymour Owens, contra.

Jordan, Judge. Liability under the Federal Employers' Liability Act arises from negligence, not from injury, and such negligence must be the cause of the injury. *Brady v. Southern R. Co.*, 320 US 476 (64 SC 232, 88 LE 239); *Tiller v. Atlantic C.L.R. Co.*, 318 US 54, 67 (63 SC 444, 87 LE 610). To recover under this Act it is incumbent for the plaintiff to affirmatively prove that the defendant was negligent and that such negligence was the proximate cause, in whole or in part, of the injury; and liability cannot be predicated on mere speculation. *Tennant v. Peoria &c. R. Co.*, 321 US 29 (64 SC 409, 88 LE 520).

The rule governing the duty of the trial court on a motion for a directed verdict or judgment notwithstanding the verdict in actions under the Federal Employers' Liability Act has been defined by the United States Supreme Court as follows: "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by nonsuit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims." *Brady v. Southern R. Co.*, 320 US 476, 479, *supra; Patton v. Texas &c. R. Co.*, 179 US 658 (21 SC 275, 45 LE 361).

It is not, however, the function of the trial court in an action under the FELA to search the record for con-

flicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences and courts are not free to reweigh the evidence and set aside a jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. *Gallick v. Baltimore & O. R. Co.*, 372 US 108 (83 SC 659, 9 LE2d 618); *Webb v. Illinois Central R. Co.*, 352 US 512 (77 SC 451, 1 LE2d 503). But there is still room for "judicial appraisal as to the sufficiency of evidence to support a jury verdict." *Shea v. N. Y., N. H. & Hartford R. Co.*, 316 F2d 838, 840. *Inman v. Baltimore & O. R. Co.*, 361 US 138 (80 SC 242, 4 LE2d 198); *Herdman v. Pennsylvania R. Co.*, 352 US 518 (77 SC 455, 1 LE2d 508). The jury should not be permitted to speculate as to the cause of a personal injury, and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the defendant. *Atchison T. & S. F. R. Co. v. Toops*, 281 US 351 (50 SC 281, 74 LE 896). The essential requirement in determining whether the evidence is sufficient for the jury is that mere speculation should not be allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. *Tennant v. Peoria &c. R. Co.*, 321 US 29, *supra*.

With these general principles in view, we will now consider the primary contentions of the defendant that the evidence adduced on the trial of the case was

insufficient to show that the railroad breached any legal duty which it owed to the plaintiff or that the injuries allegedly sustained by the plaintiff were proximately caused, in whole or in part, by any negligence on the part of the railroad; and that the trial court erred in denying the defendant's motion for judgment notwithstanding the verdict.

1. With reference to count 1 of the petition, the evidence disclosed that the defendant's train was being operated at a lawful speed as it approached the industrial side track at the Tifton Concrete Pipe Company and that the engineer began a normal deceleration of the engine, preparatory to stopping for the switching operation to be performed there; and there is no evidence which showed, directly or by inference, that the plaintiff was required to disembark from the train at any particular point before it came to a halt, or that the train was required to be traveling at any specific speed during deceleration, and before coming to a complete stop. Conversely, the plaintiff testified that the decision as to when and at what speed to drop from the train was entirely his own. "It's just a question of watching the movement of the ground. Whether or not it is a safe speed to get off the engine is a question of judgment and of watching the movement of the ground. When you are on the side of the train, you have to use your judgment. I have had eight and a half years' experience. Based on my experience I had had in that area before, I decided it was safe to drop off. I say I had to run forty feet [to keep balance after jumping]." The plaintiff also testified: "Whatever speed the train was

traveling, the only person who makes the decision is the person getting off. I was the person that made it on this day."

Under this testimony of the plaintiff which disclosed that the decision as to when and where to drop off the engine was entirely his, and in the absence of any evidence to show that the plaintiff stumbled or otherwise lost his balance due to the condition of the roadbed after jumping, a finding was demanded that the railroad did not breach any legal duty which it owed the plaintiff in connection with his disembarking from the train, and consequently, no negligence is shown by the proof submitted in support of the allegations of count 1 of the petition.

In regard to Count 2, the plaintiff testified that if the derailer had been working properly, he could have turned the lever with one hand, but that as a result of its improper maintenance, the lever was difficult to turn, and required the use of both hands to turn it; and in connection with count 3 the substance of the plaintiff's testimony was that the ground level of the area in which the cement car was spotted or placed had been built up by the accumulation of cement spilled in unloading cars and this resulted in his having to get into a more awkward position to chock the wheel of the car than would have been required if the area had been clear of said waste material. It is contended that the railroad had knowledge of these dangerous conditions, and thus breached the duty which it owed the plaintiff to provide him with a safe place to work and with safe appliances with which to work.

Upon a review of the evidence adduced in support of these counts of the petition and of applicable decisional law, it is our opinion that the evidence was insufficient to authorize a jury to find that the railroad was negligent in these instances. In so ruling we are of course assuming that the evidence did show that the conditions described by the plaintiff existed and that the railroad had knowledge of them, and we have otherwise considered the evidence in the light most favorable to the plaintiff.

As stated by the United States Supreme Court in a very recent decision: "Reasonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence." *Gallick v. Baltimore & O. R. Co.*, 372 US 108, *supra*, and cases therein cited. The failure to guard against the bare possibility of injury is not actionable negligence. "Bare possibility is not sufficient. Milwaukee & St. P. R. Co. v. Kellogg, 94 US 469, at 475 [24 LE 235]: 'But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.' Events too remote to require reasonable prevision need not be anticipated." *Brady v. Southern R. Co.*, 320 US 476, 483, *supra*. Applying these principles of law to the facts of this case, the conclusion is inescapable that knowledge on the part of the defendant that one of its switchmen would have to use two hands instead of

one to turn a lever on a switch or derailer, or would have to stoop or squat down in a more awkward position to chock a wheel because of the slightly raised level of the ground due to waste spillage, would raise nothing more than a bare possibility of harm to such employee which it would be under no legal duty to guard against. As was stated in *Spencer v. Atchison, T. & S. F. R. Co.*, 92 Cal. App. 2d 490, 496 (207 P2d 126): "Manifestly defendant had no reason to anticipate that because the spring switch was harder to throw than a rigid switch, the use of the spring switch would result in an injury to an employee throwing the switch. Defendant was not negligent in failing to foresee such possible injury." And see *Lowden v. Bowen*, 199 Okla. 180 (183 P2d 980) in which it was held that negligence was not proved because a flat car pushed by the plaintiff was worn and harder to push than other flat cars in better condition. And see *Atlantic C. L. R. Co. v. Collins*, 235 F2d 805, 808, in which the court stated that evidence that the plaintiff's back injury was caused by exertion in operating a defective switch which was harder to operate than similar switches, "taken in the light most favorable to the plaintiff may give rise to the speculation whether the injury was due to a defective switch of the railroad company or to the defective back of the man: but speculation is not enough."

In so ruling, we recognize that over-exertion resulting in serious casualties is something which can as well be foreseen as many other occurrences and is something which an employer must take reasonable steps to guard against; and under proper circumstances, a jury

question may be presented as to whether or not the performance of a task was so likely to result in injury from over-exertion to the workman, that a prudent employer would not have allowed the same to be performed without taking steps to guard against the possibility of injury. See *Stewart v. Baltimore & O. R. Co.*, 137 F2d 527. But, as was pointed out in the *Stewart* case, at page 529: "Doubtless an employee cannot recover damages for every harm he may suffer through failure of his employer to provide him with the best sort of appliance unless the situation is such that the chance of injury can be reasonably foreseen."

The likelihood of injury to the plaintiff in this case resulting from the performance of his required duties under the conditions present was so negligible that the same could not be reasonably foreseen; and consequently, the defendant did not fail in any legal duty it owed the plaintiff under the circumstances of this case. A verdict was therefore demanded that the defendant was not negligent as contended in the three counts of the plaintiff's petition; and it was error for the trial court to deny the defendant's motion for a judgment notwithstanding the verdict.

2. Assuming for the sake of argument only, however, that a finding was authorized that the defendant railroad was negligent in at least one of the particulars charged in the petition, there is still another reason which impels the conclusion that the plaintiff failed to carry the burden of proof in this case.

[P]roof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The injury may not be permitted to speculate as to its cause, and the case must be withdrawn from its consideration, unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer." *Atchison, T. & S. F. R. Co. v. Toops*, 281 US 351, 354, *supra; Northwestern Pac. R. Co. v. Bobo*, 290 US 499 (54 SC 263, 78 LE 462); *Brady v. Southern R. Co.*, 320 US 476, *supra; Fort Worth & Denver City R. Co. v. Smith*, 206 F2d 667, 670.

The plaintiff testified that he did not know which one of the three incidents set forth in his petition caused his back injury but that he knew that one of the three was responsible for the same. This conclusion, however, was unsupported by any evidence which directly showed that any one of the three occurrences specifically caused or contributed to the injury; nor was there any evidence which tended to discount the possibility that the injury was caused when he bent down to uncouple or recouple the railroad cars; and under the medical testimony in this case, said activity could just as well have effected the plaintiff's back pain as that complained of in the petition. There were no probative facts from which the jury could reasonably infer that the plaintiff's back injury resulted from the activity relied on in any one of the three counts of the petition as opposed to the others, or as opposed to the other duties performed by the plaintiff in the switching operation.

Under these circumstances the jury could do no more than guess or speculate as to the immediate cause of the plaintiff's injuries, and such evidence is insufficient to support a verdict. *Ladson Motor Co. v. Croft,* 212 Ga. 275, 277 (92 SE2d 103). As stated in *Georgia R. &c. Co. v. Harris,* 1 Ga. App. 714, 717 (57 SE 1076): "When the party upon whom the burden of an issue rests seeks to carry it, not by direct proof, but by inferences, he has not, in this reasonable sense, submitted any evidence for a jury's decision, until the circumstances he places in proof tend in some proximate degree to establish the conclusion he claims, and for this, the facts shown must not only reasonably support that conclusion, but also render less probable all inconsistent conclusions."

Under the Federal civil procedure, the law is stated thusly: "Alternative possibilities as to the cause of an event are not enough where the defendant is liable under one and not under the others and where no basis for a rational choice among the alternatives is provided. They invite sheer conjecture and speculation and hence raise no question for the jury." *Ralston Purina Co. v. Edmunds,* 241 F2d 164, 167. And in an action under the Federal Employers' Liability Act, "The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." *Galloway v. United States,* 319 US 372, 395 (63 SC 1077, 87 LE 1458); *Tennant v. Peoria &c. R. Co.,* 321 US 29, 32, *supra.*

3. Under any view of this case the plaintiff failed to carry his burden of proof that the injuries sustained by him were proximately caused, in whole or in part, by an act of negligence of the defendant railroad, and this being an essential requirement under the FELA a verdict was demanded for the defendant. The trial court erred therefore in denying the defendant's motion for judgment notwithstanding the verdict, and that judgment must be reversed. It is not necessary to consider the assignments of error on the denial of the amended motion for new trial.

Judgment reversed. Nichols, P. J., and Frankum, J., concur.

APPENDIX B.

COURT OF APPEALS OF THE STATE OF GEORGIA

ATLANTA, December 20, 1963

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

Georgia, Southern & Florida R. Co. v. F. E. Meeks

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

APPENDIX C.

SUPREME COURT OF GEORGIA

ATLANTA, February 10, 1964

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered:

Frank E. Meeks v. Georgia Southern & Florida Railway Co.

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur.

APPENDIX D.

COURT OF APPEALS OF THE STATE OF GEORGIA

ATLANTA, February 14, 1964

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

Georgia, Southern & Florida R. Co. v. F. E. Meeks

Notice having been given by the defendant in error of his intention to petition the United States Supreme Court for the writ of certiorari in this case it is ordered that the remittitur be withheld from transmission to the Superior Court of Tift County for a period of Ninety days from this date.

APPENDIX E.

Sec. 1251. Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, C. 646, 62 Stat. 929.

APPENDIX F.

'The Federal Employers' Liability Act.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children

of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404, 45 U.S. Code, Sec. 51.

APPENDIX G.

Contributory Negligence; Diminution of Damages.

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of

negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 3, 35 Stat. 66, 45 U. S. Code, Sec. 53.

APPENDIX H.

Assumption of Risks of Employment.

That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 4, 35 Stat. 66; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404, 45 U. S. Code, Sec. 54.

Office Supreme Court, U.S.
FILED
MAY 8 1963

No. 981

Supreme Court of the United States

OCTOBER TERM, 1963

FRANK L. MEEKS, *Petitioner*,

v.

GEORGIA SOUTHERN & FLORIDA RAILWAY COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF GEORGIA

BRIEF FOR RESPONDENT IN OPPOSITION

W. GRAHAM CLAYTOR, JR.
P. O. Box 1808
Washington 13, D. C.

CHARLES J. BLOCH
DENMARK GROOVER, JR.
710 Walnut Street Building
Macon, Georgia

WILLIAM H. ALLEN
701 Union Trust Building
Washington 5, D. C.

Attorneys for Respondent

BLOCH, HALL, GROOVER
& HAWKINS

COVINGTON & BURLING

Of Counsel

May, 1963

TABLE OF CONTENTS

	Page
Question Presented	1
Statement	2
Reasons for Denying the Writ	5
Conclusion	10

INDEX TO AUTHORITIES

Brady v. *Southern Ry.*, 320 U.S. 476 (1943) 3
Gallick v. *Baltimore & O. R.R.*, 372 U.S. 108 (1963) 7, 9
Lavender v. *Kurn*, 327 U.S. 645 (1946) 7
Moore v. *Chesapeake & O. Ry.*, 340 U.S. 573 (1951) 7
Rogers v. *Missouri Pac. R.R.*, 352 U.S. 500 (1957) 10
Tiller v. *Atlantic Coast Line R.R.*, 318 U.S. 54 (1943) 9

Supreme Court of the United States

OCTOBER TERM, 1963

No. 981

FRANK E. MEEKS, *Petitioner*,

v.

GEORGIA SOUTHERN & FLORIDA RAILWAY COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether a railroad is liable under the Federal Employers Liability Act to an employee who affirmatively testifies that he is unable to say which of three events was responsible for aggravating pre-existing back trouble, where at least one of the events occurred solely by the employee's own choice and without any negligence whatever on the part of the railroad, and where no harm of the kind suffered by the employee could have been foreseen by the railroad from the conditions associated with the other two events.

STATEMENT

Petitioner, a brakeman in respondent's employ, suffered an aggravation of a pre-existing back condition during a switching operation at a concrete pipe plant in Georgia. The following are the facts, stated most favorably to petitioner and resolving all conflicts in his favor, that appear from the evidence in petitioner's action against respondent under the Federal Employers Liability Act:

On March 6, 1960, petitioner was a member of the crew of a local freight train operating between Valdosta and Macon, Georgia. (R. 30). The train was to stop just south of Tifton, Georgia, to leave a car of cement on an industrial track serving a plant there. (R. 30-31). In order to carry out his duties connected with the placement of the car petitioner dismounted from the engine. He did so while the train, being decelerated in the ordinary way for the stop, was traveling 10 to 15 miles an hour (R. 32), a lawful speed.[1] Petitioner made the choice to drop from the engine when he did because, based on his experience, he decided it was safe to do so at that point (R. 44-45), even though the usual speed for dismounting is 5 to 10 miles an hour (R. 32). If he had waited until the train was at a complete stop, he would have had to walk back along the track two or three car lengths to be where he had to be to perform the first of his duties. (R. 32). Petitioner, having dropped off when he did, had to run about thirty feet along the right of way to keep his balance. (R. 32, 42). There was no level pathway. (R. 31). Petitioner did not fall (R. 32),

---

[1] The engineer testified that the train was going between 8 and 10 miles an hour. (R. 96).

and he did not say that he stumbled or otherwise strained himself on any of the rocks in the ballast along the track.

Petitioner's first duty was to uncouple the car that was to be placed on the industrial track from the car immediately behind it in the train. This he did (R. 32-33), and he then threw the switch and went to remove a derailer from the side track as the engineer moved to put the desired car in position for placement on that track (R. 33). A derailer is a piece of metal resting on top of the rail of a side track some distance back from the switch point. It prevents cars on the siding from rolling out on to the main line.[2] When a car is being placed on the siding the derailer must be temporarily removed. Petitioner found that he had to get into an inconvenient position and exert more pressure than was ordinarily required in order to remove the derailer on this occasion. (R. 34, 36). The derailer did not seem to be well conditioned or lubricated; to the best of petitioner's knowledge it had not been properly maintained for six months. (R. 35).

Petitioner next had to uncouple the cement car from the car immediately ahead of it in the train and spot it on the side track. After this was done he placed a chock under a wheel to keep it from rolling, and, because cement and other material that had spilled in the past had piled up in the area around the track, he had to get into an awkward position in order to place the chock. (R. 35-36). Finally, petitioner replaced the derailer in position and locked it and then recoupled the two parts of the train. (R. 36).

---

[2] See Brady v. Southern Ry., 320 U.S. 476, 478 n.2. (1943).

As petitioner was walking back to the engine he felt pains in his back. (R. 37). The condition grew worse, and in September 1961 a spinal fusion operation was performed on petitioner. (R. 37-38, 76-79).

By petitioner's statement one of three events that he attributed to respondent's negligence—the running he did to keep his balance after dropping from the train, the unusual effort he expended to remove the derailer or the awkward posture he assumed to place the chock—caused the injury to his back. He testified that he did not know which of the three it was. (R. 155). Nor did he give any reason for what he professed was his knowledge that it was one of these three and not some other thing such as uncoupling and coupling cars that he had also done in the five minutes in which he was engaged in performing his duties near Tifton.[3] Petitioner had had trouble with his back previously (R. 39-40, 56, 65, 104-05, 109-10, 150-51), and the doctor who performed the operation on petitioner believed, on the basis of petitioner's history and his observation, that some quite normal, everyday strain or slight mishap could have caused the aggravation of his condition that petitioner experienced (R. 79-82)—although, of course, the greater the strain, the greater the likelihood of aggravation (R. 82).

A jury in the Tift County, Georgia, Superior Court returned a verdict for petitioner. (R. 26). Respondent's motion for judgment notwithstanding the verdict was denied, as was its motion for a new trial on grounds unrelated to the sufficiency of the evidence. (R. 29). Judgment was entered for petitioner. (R. 26).

---

[3] There was testimony by two others in the crew that petitioner told them at the time that he thought he had stumbled on a rock while engaged in coupling. (R. 96, 149-50).

On appeal, the Georgia Court of Appeals reversed. (Pet. App. 33). It held that there was no evidence that respondent was negligent, or that, if it was negligent, its negligence caused petitioner's injury. The court in its opinion discussed the controlling decisions of this Court under the FELA, recognizing that under those decisions courts are not to seach out evidence contrary to the evidence on which a jury might properly base a verdict for the plaintiff and are not to reweigh the evidence and set aside a jury verdict on the ground that they would have decided the case differently. The Court of Appeals did not reach the questions of law raised in respondent's motion for a new trial and preserved on its appeal. Those questions would remain open if this Court disagreed with the court below on the lack of evidence and reversed on that point. The Supreme Court of Georgia denied a writ of certiorari. (Pet. App. 49).

REASONS FOR DENYING THE WRIT

This is not a case in which a state court has ignored or obdurately declined to follow the controlling decisions of this Court concerning the evidentiary showing a plaintiff must make to reach the jury in an FELA case. The Georgia Court of Appeals cited, discussed and recognized the controlling force of this Court's FELA decisions. It simply held that in light of the principles established by those decisions the petitioner's case was not one on which a jury could reasonably find the respondent liable and therefore the respondent's motion for judgment notwithstanding the verdict should have been granted. In so holding the court below was clearly correct, and there is no occasion for further review by this Court.

Petitioner's testimony was that the immediate pain in his back and the subsequent troubles with his back were caused by one of three events—coincidentally the three events of several that occurred during the approximately five minutes of switching in which his back was hurt that he had alleged in his complaint as negligence. This testimony was the only affirmative evidence as to a causal relationship between things respondent arguably did or permitted to exist and petitioner's injury. Petitioner was unable to say any more than that. His testimony was that "I do not know which of the three was the cause of my injury . . .." (R. 155).[4]

In these circumstances it was necessary, if petitioner was to carry his burden of proving respondent liable, that he show at least that respondent's negligence was responsible for all three of the events of which one was by his account to blame for his injury. For in this case all the possibilities respecting causation arose from the same evidence, the testimony of petitioner. No process of reasoning, no application of the jurors' wisdom drawn from their experience of life—nothing indeed except the sheerest speculation—could enable the jury to choose one of these possibilities to the ex-

[4] Nor did petitioner explain how, unable to identify any particular incident as the cause of his injury, he nevertheless knew it was one of the three events he named and not something else that he had done or that had happened to him during the critical period. On the medical testimony it was quite possible that some everyday strain such as might be involved in coupling or uncoupling cars of the train could have been the causal aggravating factor. Moreover, petitioner's testimony as to causation, such as it was, was an afterthought, presented on rebuttal in apparent response to testimony that petitioner had told fellow crew members contemporaneously that he had stumbled on a rock as he was coupling.

clusion of the others. *Cf. Moore* v. *Chesapeake & O. Ry.*, 340 U.S. 573, 576 (1951). In this the case is altogether unlike *Lavender* v. *Kurn*, 327 U.S. 645 (1946), and *Gallick* v. *Baltimore & O.R.R.*, 372 U.S. 108 (1963), where this Court held that juries in FELA cases must be allowed to choose among different possible inferences or theories as to causation presented on the evidence. Here there was a single theory and no basis on which to prefer one possible inference to another. The Court in *Lavender* v. *Kurn* made clear that, while it would not do for a defendant merely to assert that a jury's verdict in favor of a plaintiff "involved speculation and conjecture," a jury's decision that an employer was negligent and the negligence contributed to its employee's injury must be susceptible to rational justification. 327 U.S. at 653. This will continue to be so as long as liability under the FELA is dependent on negligence, and the statute is not effectively a workmen's compensation act under which a jury assesses compensation without regard to any prescribed scale.

The petitioner did not carry the burden of proof that was his or provide the jury with a rational justification for the verdict it returned. To do that he must have shown that all three of the events to which he attributed his injury were the result of respondent's negligence. Rather, as the court below held, on the record made by petitioner the respondent was not negligent with respect to any of the three events. As for one—petitioner's dismounting from the train while it was still running—there is no basis in the record from which it can be inferred that respondent was in any way at fault. As for the conditions that led to the

other two incidents in which petitioner might have strained his back, respondent could not be found negligent on this record because on the reading of the evidence most favorable to petitioner harm of the kind suffered by him was not reasonably to be foreseen.

Petitioner's own testimony was that he alone decided the point at which he would drop off the engine in the vicinity of the place where the switching was to be done, and that he made the decision to drop off where he did because he thought it would be safe to do so. The train at that time, by petitioner's testimony, was going 10 to 15 miles an hour. There was no evidence that this was an unlawful or inherently improper or unsafe speed. Quite the contrary. The undisputed evidence was that, having decelerated to this speed at this point, the engineer was able to bring the train to a stop exactly where it was meant to stop. (R. 46, 96). There was evidence that a speed of 10 to 15 miles an hour was faster than customary for dismounting for a switch. But there was no evidence whatever that petitioner was, or believed himself to be, under any compulsion from any rule or practice, formal or informal, of respondent to drop off the engine where he did when the train was going at that speed. The only cost to the petitioner of waiting until the train came to a complete stop—let alone waiting only until it had slowed down to the ordinary dropping-off speed—would have been that he must walk back two or three car lengths, 90 to 135 feet, along the track to get to where he had to be to begin the switching operation. There is no evidence that respondent would have begrudged the petitioner the few seconds he might have

spent in thus walking less than half the length of a football field to reach his appointed duty post.[5]

The point here is not that petitioner was guilty of contributory negligence or that he voluntarily assumed a risk by dropping from the engine when he did, but rather that there is an utter lack of evidence that it was in any wise negligent on the part of respondent that the train, in the process of decelerating, should have been traveling at 10 to 15 miles an hour at the point where it was going at that speed. *Cf. Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54 (1943).

On this view and without regard to anything else respondent was entitled to judgment notwithstanding the verdict. As we have indicated, no jury could say in reason, or on any basis other than mere conjecture, that petitioner's injury more probably was caused by one of the two other incidents to which he attributed it than by his running to keep his balance after dropping to the ground from the engine of the train.

There is more, however. As the court below held, neither of the other two incidents involved negligence on the part of respondent because the harm suffered by petitioner was not reasonably to be foreseen from them. "[R]easonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence." *Gallick* v. *Baltimore & O.R.R.*, 372 U.S. 108, 117 (1963).

To be sure, overexertion on the part of an employee is a risk that may be reasonably foreseeable when an

---

[5] Petitioner now emphasizes in this Court the condition of the ground around the track, but, as the court below found (Pet. App. 42), this is clearly irrelevant when there is a complete absence of evidence that petitioner stumbled or suffered any other mishap that might not have happened if he had been running along a level footpath to keep his balance.

employer creates or allows to persist some unusual conditions attending an employee's work. If petitioner's view of what the evidence showed is accepted, respondent had in use a derailer that was somewhat more difficult to remove from the rail than most other derailers and it allowed waste to accumulate so that the ground level near some tracks was built up. These conditions pose such negligible risks of harm to an employee working under them that respondent cannot rationally be held negligent on a record showing no more than the existence of such conditions.

In short, the proofs in this case did not "justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury . . . for which damages are sought." *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957). The decision below that this was so merits no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

W. GRAHAM CLAYTOR, JR.
P. O. Box 1808
Washington 13, D. C.

CHARLES J. BLOCH
DENMARK GROOVER, JR.
710 Walnut Street Building
Macon, Georgia

WILLIAM H. ALLEN
701 Union Trust Building
Washington 5, D. C.

Attorneys for Respondent

BLOCH, HALL, GROOVER & HAWKINS

COVINGTON & BURLING

Of Counsel

May 1964